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No. _____

In the Supreme Court of the United States

KENNETH HOOVER, ALBERT GUYTON AND ALEX GUYER,
Respondents

vs.

THE CUMBERLAND-MARYLAND AREA TEAMSTERS PENSION FUND, JOSEPH FRENO, JAMES HUTCHINSON, WILLIAM PETERSEN and WILLIAM LEMON, Trustees of the Cumberland-Maryland Area Teamsters Pension Fund;
Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Attorney for Petitioners

QUESTIONS PRESENTED

1. Was Section 204(g) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1054(g), violated when financial conditions required the Cumberland-Maryland Area Teamster Pension Fund to revert to its original method of calculation of Reciprocal Partial Pensions for individuals who were no longer participants in the Fund.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are a class of individuals who before 1968 were participants in the Cumberland-Maryland Area Teamsters Pension Fund and the Cumberland-Maryland Area Teamster Pension Fund. The Attorney General filed a Brief Amicus Curiae but did not participate in the oral argument.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THIS PROCEEDING ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATUTE INVOLVED 2

OPINIONS BELOW 2

STATEMENT OF CASE 2

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 8

APPENDIX:

A—Opinion and Judgment of the Court of Appeals 1a

B—Order of the Court of Appeals Denying Rehearing 1b

C—Findings of Fact and Conclusions of Law of the District Court 1c

Page

TABLE OF AUTHORITIES

CASES

Alessi v. Raybestos-Manhattan, Inc.,
451 U.S. 504 (1981) 7

Nachman Corporation v. Pension Benefit Guaranty Corporation, 446 U.S. 359 (1980)..... 7

STATUTE

Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. Sections 1001-1381 .....2, 3

In the Supreme Court of the United States

KENNETH HOOVER, ALBERT GUYTON AND ALEX GUYER,

Respondents

vs.

THE CUMBERLAND-MARYLAND AREA TEAMSTERS PENSION FUND, JOSEPH FERNO, JAMES HUTCHINSON, WILLIAM PETERSEN and WILLIAM LEMON, Trustees of the Cumberland-Maryland Area Teamsters Pension Fund;

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JURISDICTION

The judgment of the Court of Appeals was made and entered on March 19, 1985. A timely Petition for Rehearing in banc was requested said Petition being denied by the Court of Appeals by Order dated May 6, 1985. The jurisdiction of this court is envoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

The statute involved in this case is the Employee Retirement Income Security Act of 1974 (ERISA). 29 U.S.C. Sections 1001-1381.

OPINIONS BELOW

The Opinion of the Court of Appeals is not yet reported. The District Court did not write an Opinion however made extensive findings of fact and conclusions of law which are attached to the Appendix.

STATEMENT OF THE CASE

This is a class action brought on behalf of various individuals employed by or formerly employed by trucking companies who were contributors to the Cumberland-Maryland Area Teamster Pension Fund. The Cumberland-Maryland Area Teamster Pension Fund was in existence prior to the enactment of ERISA, its provisions having been modified to comply with the relevant provisions of ERISA.

In 1968 several of the larger employers who were contributors to the Cumberland-Maryland Area Teamster Pension Fund relocated their terminals to areas which were more conveniently located to the interstate highway system. The individuals represented in this class action chose to relocate with their employers. Following the relocation of their operations, no additional contributions were made by these employers on behalf of their employees to the Cumberland-Maryland Area Teamster Pension Fund due to the fact that they were now within the jurisdiction of other pension funds.

At approximately the same time as these employers began to leave the jurisdiction of the Cumberland-Maryland Area Teamster Pension Fund, a reciprocal agreement was being signed by various teamster pension funds nationwide. The Cumberland-Maryland Area Teamster Fund became a signatory to the reciprocal agreement. The reciprocal agreement provided that the individuals who relocated their employment to the jurisdiction of another pension fund would not lose their service credit (years of service) that they had accumulated in their previous fund. As the employers left the jurisdiction of the Cumberland Fund, the years of service or service credit accumulated by their employees would be recognized when they reached normal retirement age even though there was no additional contributions made to the Cumberland Fund for these particular employees. Conversly, the pension fund to which these employers became contributors, in this particular case it was primarily the Western Pennsylvania Teamster and Employers Pension Fund, would also recognize the years of service earned in the Cumberland Fund when calculating their pension benefit even though they received no contribution for those years.

In calculating the amount of pension benefit due to an employee under these reciprocal partial pensions, the plan documents and trust agreement for the Cumberland Fund provided for the use of a fraction or unit multiplier. Following the implimentation of the reciprocal agreement by the Cumberland Fund, the Trustees of that Fund on June 16, 1969 amended the pension plan and provided for the calculation of the reciprocal partial pensions, none of which have been granted as of that date, by use of the unit multiplier in effect when the individual terminated his/her participation with the plan.

In 1972 this method of calculation of reciprocal partial pension benefits was again altered by amendment to the plan to the use of the unit multiplier in effect at the time of the retirement of the individual involved as opposed to the date of his termination from participation in the Cumberland Fund. All applicants for reciprocal partial pension benefits have their pension benefits calculated in this manner until 1978.

In a Trustees' meeting in October of 1979, the method for calculating the reciprocal partial benefits was again amended to revert back to the original method of calculation, that being the use of the unit multiplier in effect when the individual terminated his/her participation with the plan. This amendment was brought about by the dire financial circumstances in which the plan had found itself. The dramatic decrease in participating members in the Cumberland Fund and the corresponding decrease in the amount of contributions being received placed the Fund in a very poor financial posture. Complicating this situation was the fact that through negotiation nationwide the unit multiplier being used to calculate pension benefits had increased dramatically and proportionately with the drastic increase in the rate of contributions made on behalf of the individual employees of the various trucking firms. These two factors combined led the actuary and consultants to the Cumberland Fund to advise the Trustees of the financial situation particularly with regard to the experienced loss and contributory deficiency occurring between the dates of February 1, 1976 and June 1, 1977. Following receipt of this advice, the Trustees voted unanimously to amend the plan to revert back to use of the unit multiplier in effect at the time of the individual termination from the Fund in calculating partial pension benefits. This case

involves the legality of the Trustee's action in amending the plan in 1978 to place the Fund on a more secure financial footing.

Following a bench trial in the District Court for the Western District of Pennsylvania, the Honorable Donald E. Ziegler made findings of fact and conclusions of law holding that the Trustees' action taken in 1979 did not violate the applicable sections of the Employment Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. Section 1001-1381. Judgment on the lower court's findings was entered on June 27, 1984. An appeal was filed with the Third Circuit Court of Appeals on February 23, 1984 and oral argument was held on December 4, 1984.

By Opinion of March 19, 1985, the Third Circuit Court of Appeals reversed the findings of the District Court and held that the action taken by the Trustees of the Cumberland Fund violated ERISA particularly Section 204(g). A timely Petition for Rehearing by the court in banc was filed and that Petition was denied by Order of May 6, 1985.

REASONS FOR GRANTING WRIT

1. **This case presents an important question of Federal Law which will continue to be at issue until resolved by this court. The Employee Retirement Income Security Act of 1974 provides certain protection of benefits of various plans. The Cumberland-Maryland Area Teamster Pension Fund is a multi-employer plan which is subject to the guidelines of ERISA.**

At issue in this case are certain partial pension benefits granted pursuant to a reciprocal agreement to which the Cumberland Fund became signatory to in 1968. The Court

of Appeals held that the Cumberland Fund violated Section 204(g), 29 U.S.C. Section 1054(g) when it altered the method of calculation of these benefits. This alteration was made by the Fund in 1979 and it was undisputed that at that time the Fund had to take some action in order to protect its financial solvency.

This Fund, like many other teamster funds and other multi-employer funds found itself in the position of shrinking membership and increasing liabilities. Many factors including deregulation of the trucking industry have caused membership in many of the smaller teamster funds to stagnate or decrease. In order to protect the financial integrity of the Fund and secure the benefits for current participants, multi-employer funds have been searching for solutions to the aforementioned problems.

The holding of the Circuit Court in this matter prevents this Fund and other Funds in similar positions from altering the manner of calculation of these reciprocal partial pensions to more closely correspond with the amount of contribution received on behalf of the individuals seeking a pension benefit. The Circuit Court has held that the level of benefit granted by amendment in 1972 is protected under the accrual provisions of ERISA thereby preventing its later reduction despite the bleak financial position of the Fund. It should be noted that the reduction was only to the level of benefit originally granted at the inception of the reciprocal agreement in 1968 which corresponded with the contribution received by the Cumberland Fund on behalf of the employees involved. The inability of multi-employer plan funds to alter the level of benefit for these reciprocal partial pensions will impede if not make impossible the ability of the funds to maintain the required funding standard and provide for payment of present and

future benefits. For this reason, the Supreme Court should grant this Petition for Certiorari to provide guidance for multi-employer plan funds, similar to the Cumberland Fund, who are presently searching for alternatives to deal with present financial difficulties.

2. The Supreme Court has addressed issues similar to the one in the present controversy in the case of *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) and *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359 (1980).

The Supreme Court in both of these decisions provided for some flexibility in establishing a level of benefit. The Circuit Court's holding that a benefit level, once set, cannot be reduced flies in the face of the language of this court's Opinions in *Alessi*, supra., and *Nachman Corporation*, supra. To follow the Circuit Court's ruling places an impossible burden upon this Fund as well as other multi-employer pension funds in that they would have to have perfect foresight to predict future economic conditions in setting their level of benefit. Logic dictates that this cannot be done.

This Petition for Certiorari should be granted in order to clarify this court's ruling in both *Alessi*, supra., and *Nachman Corporation*, supra., and to provide additional guidance for multi-employer pension funds.

CONCLUSION

This Petition for Certiorari should be granted.

Respectfully submitted,

WEIS & WEIS
By: THOMAS F. WEIS,
Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3116

KENNETH HOOVER, ALBERT GUYTON and
ALEX GUYER

vs.

CUMBERLAND, MARYLAND AREA TEAMSTERS
PENSION FUND

JOSEPH FRENO, JAMES HUTCHINSON, WILLIAM
PETERSON AND WILLIAM LEMON, TRUSTEES OF
CUMBERLAND, MARYLAND AREA TEAMSTERS
PENSION FUND

WESTERN PENNSYLVANIA TEAMSTERS
AND EMPLOYERS PENSION FUND
(withdrawn, see order of 9/17/84)

and

JAMES BEROS, CHARLES M. BYRNES, WILLIAM M.
GHERILLA, WALTER CHRZAN, JOHN PUSKARISH,
LESLIE BREMAN, JULIUS R. CASALI, JOHN W.
FLANIGAN, JAMES H. HUTCHINSON, JR. and
JOSEPH E. ZAUCHA, TRUSTEES OF W. PA.
TEAMSTERS AND EMPLOYERS PENSION FUND
(withdrawn per order of 9/17/84)

Kenneth S. Hoover, et al.,
for themselves and the
certified class, *Appellants*

Appeal from the United States District Court
for the Western District of Pennsylvania - Pittsburgh
(D.C. Civil No. 81-1725)

Argued
December 4, 1984
Before: ALDISERT, *Chief Judge*,
BECKER, *Circuit Judge*,
and CAHN, *District Judge*.*

(Filed March 19, 1985)

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* Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

CAHN, *District Judge.*

This is an appeal by plaintiffs, former participants in the Cumberland, Maryland Area Teamsters Pension Fund ("Cumberland Fund"), from a judgment of the United States District Court for the Western District of Pennsylvania holding that the adoption of a plan amendment altering the calculation of partial pension benefits did not violate the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1381 (1982).[1] Plaintiffs argue that the plan amendment decreased accrued benefits in

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1. The district court, on March 15, 1983, certified this case as a class action on behalf of all drivers employed by the Interstate Motor Freight Company or the Cooper-Jarrett Company who transferred from the Bedford Area Teamsters Local 453 to the Pittsburgh Area Teamsters Local 249 between 1967 and 1972.

contravention of an explicit prohibition set forth in section 204(g) of ERISA. 29 U.S.C. § 1054(g) (1982), *as amended by* Retirement Equity Act of 1984, Pub. L. No. 98-397, § 301, 98 Stat. 1426, 1451 (1984), and its counterpart in the Internal Revenue Code of 1954, 26 U.S.C. § 411(d)(6) (1982), *as amended by* Retirement Equity Act of 1984, Pub. L. No. 98-397, § 301, 98 Stat. 1426, 1450 (1984). The district court held that no violation occurred because the partial pension benefits reduced by the amendment are ancillary benefits not protected from diminution or elimination under ERISA. Because we hold that plaintiffs' benefits reduced by the plan amendment are *accrued* benefits subject to the protection of section 204(g), we reverse as to defendants Cumberland Fund and the individually named trustees of that Fund.[2]

I.

Prior to 1967, plaintiffs worked as truck drivers in the Bedford, Pennsylvania area, and belonged to Local Union 453 of the International Brotherhood of Teamsters. As members of Local 453, they participated in the Cumberland Fund, a multiemployer pension

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This court has previously examined the Cumberland Fund Plan in Kagarise v. Cumberland, Maryland Area Teamsters Pension Fund, 661 F.2d 19 (3d Cir. 1981). The parties in *Kagarise* did not raise the issue now presented, nor did this court consider the issue in its opinion. As a result, the *Kagarise* decision is not controlling here. In addition, because plaintiffs were not parties to the *Kagarise* action, they would not be precluded under *res judicata* or collateral estoppel principles from raising the statutory violation alleged in the present action. *See* Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597-99 (1948); Hubicki v. ACF Industries, Inc., 484 F.2d 519, 524 (3d Cir. 1973).

2. Defendants Western Pennsylvania Teamsters and Employers Pension Fund and the individually named trustees thereof were withdrawn as parties to this appeal by order dated September 17, 1985.

plan established by the local union and employers engaged in collective bargaining with the local. The Cumberland Fund is a qualified plan subject to the vesting, funding, and participation requirements of the Internal Revenue Code of 1954 and ERISA. Starting in 1967, the trucking companies employing plaintiffs began moving their terminals from the Bedford area to Pittsburgh, Pennsylvania, because of changes in interstate highway routes. The drivers affected by these relocations, including plaintiffs, moved with their employers to Pittsburgh. These drivers transferred to Teamsters Local 249, serving the Pittsburgh area, whose members participated in the Western Pennsylvania Teamsters and Employers Pension Fund ("Western Fund"). As a result of the move, these drivers terminated their participation in the Cumberland Fund and joined the Western Fund, although they remained with the same employer and with the same international union.

Responding to the disruption in local union jurisdiction and pension fund affiliation, a number of teamster pension funds prepared a reciprocal agreement which the trustees of the Cumberland Fund signed in 1968. The purpose of the reciprocal agreement was to provide full pensions for workers with continuous membership in the international union, but who, because of transfers to different locals, might not accrue sufficient work credit under any one plan to entitle them to full pension benefits.[3] *See*

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3. The reciprocal agreement signed by the Cumberland Fund trustees states that "Partial Pensions are provided under this Plan for employees who would otherwise lack sufficient service credit to be eligible for any pension because their years of employment were divided between different pension plans or, if eligible, whose pensions would be less than the full amount because of such division of employment."

Bianco v. Board of Trustees of Local 816 Labor and Management Pension Trust, 494 F. Supp. 206, 208 (E.D. N.Y. 1980). Under the reciprocal agreement, a union member who transferred from the Cumberland Fund to the Western Fund could cumulate his service credit from each fund, and if his total combined service credit was sufficient on retirement, he would receive proportional pension benefits from each fund. The reciprocal agreement did not specify a particular benefit rate, but rather required each fund to include in its plan documents a method for calculating the partial pensions. The Cumberland Fund Plan accordingly provided a partial pension formula:

> Article X.
>
> *Partial Pensions*
>
> *Section 10.08 Partial Pension Amount* -- The amount of the Partial Pension shall be determined as follows:
>
> (a) The amount of the pension to which the employee would be entitled under this Plan taking into account his Combined Service Credit shall be determined, then
>
> (b) The amount of service credit earned with this Plan since January 1, 1955, shall be divided by the total amount of Combined Service Credit earned by the employee since January 1, 1955, then
>
> (c) The fraction so determined in (b) shall be multiplied by the pension amount determined in (a) and the result shall be the Partial Pension Amount payable by this Plan.

Under this formula each fund to which contributions have been made pays a partial pension based on service

credit for the period of time that an employer made contributions on behalf of a participant.

To calculate the amount of the pension referred to in section 10.08(a), a "unit multiplier" in a dollar amount specified in the Plan, is multiplied by the number of years of combined service credit accumulated. The product of this multiplication is then reduced by the fraction derived from section 10.08(b) to determine the partial pension payable by the Cumberland Fund. At the time plaintiffs transferred out of the Cumberland Fund, the unit multiplier applicable in computing plan benefits was $6.00 of pension per month for each year of credited service. Initially, the Cumberland Fund Plan provided for the computation of pensions using the $6.00 unit multiplier rate. On June 13, 1972, the trustees of the Cumberland Fund amended the Plan to increase the unit multiplier used in calculating pensions to the higher of 1) the multiplier in effect at the participant's termination (or transfer) date or 2) the multiplier in effect at the participant's *retirement date*. Thus, when the unit multiplier increased in 1972, the calculation of partial pensions for drivers retiring thereafter was made with the new $25.00 unit multiplier, rather than the 1967 $6.00 rate.

On October 3, 1978, however, the trustees of the Cumberland Fund again amended the Plan. Amendment No. 5, formally adopted on January 18, 1979, changed the method for calculating pension benefits. The amendment provided for calculation of pensions with the unit multiplier in effect on a participant's termination date. Consequently, plaintiffs' partial pensions from the Cumberland Fund would be calculated using the $6.00 unit multiplier in effect on the date of their terminations (transfers), which for plaintiffs occurred before June 13, 1972.

instead of the higher rate in effect thereafter.[4] The trustees applied the 1979 amendment retroactively to June 1, 1978.[5]

Plaintiffs brought this action, challenging the legality of the 1979 amendment under ERISA.[6] Plaintiffs now appeal from a judgment of the district court that no violation of ERISA occurred. The issue before us is whether the adoption of an amendment changing the method of calculating partial pension benefits under the reciprocal agreement reduced benefits in contravention of section 204(g) of ERISA.[7]

II.

Section 204(g) unequivocally states that the "accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section [302(c)(8)]." 29

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4. The amendment changed the calculation of pension benefits by providing, for the first time, a definition of "accrued benefits" which stated that the benefit would be determined by the formula in effect on the participant's termination date. Prior to adoption of this amendment, the Cumberland Fund Plan contained no definition of accrued benefits, and all pension benefits based on service credit were determined by a formula set out in Article III of the Plan. Under the 1979 amendment, full pension benefits and partial pension benefits under the reciprocal agreement are calculated by the new formula set out under the heading "accrued benefit."

5. The 1979 amendment did not affect the partial pensions of drivers who retired after June 13, 1972 and before June, 1978. Because these drivers continue to receive benefits computed with the $25.00 rate applicable at the time of their retirement, they are not parties to this class action.

6. The district court had jurisdiction under ERISA, 29 U.S.C. § 1132(e) and (f) (1982).

7. Because of our holding that the amendment violated § 204(g) of ERISA, we do not address whether the trustees of the Cumberland Fund breached their fiduciary duty in any manner in approving the 1979 amendment.

U.S.C. § 1054(g)(1).[8] Thus, the focus of our inquiry is whether the partial pension benefits involved here qualify as accrued benefits within the meaning of that term under ERISA. ERISA's statutory definition of "accrued benefit" imparts a specific meaning to the word 'accrued, connoting a set periodic increase or accumulation. Section 3(23) states that an accrued benefit is an individual's benefit "expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A). ERISA's definitional counterpart for accrued benefit in the Internal Revenue Code, 26 U.S.C. § 411(a)(7)(A)(i), is identical, and has been interpreted by the Internal Revenue Service in a Technical Information Release:

> [I]n the case of a defined benefit plan, the "accrued benefit" must be expressed in the form

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8. The type of amendment described in § 302(c)(8) is specifically limited:

> No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary [of Treasury] notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section [303(b)]) and that waiver under section [303(a)] is unavailable or inadequate.

29 U.S.C. § 1082(c)(8). The Secretary is authorized to grant permission for amendments reducing the benefit amounts only if it is shown that the amendment is necessary to preserve the fund, and if a simple waiver of ERISA's minimum funding standards, set out in § 302, 29 U.S.C. § 1082, would not solve the fund's problems. *See* 29 U.S.C. § 1083(b). The trustees of the Cumberland Fund Plan made no effort to comply with the requirements of § 302(c)(8).

> of an annual benefit commencing at normal retirement age. The plan must provide a formula under which each participant's actual accrued benefit under the plan can be determined in each plan year.

Internal Revenue Service T.I.R. No. 1403 (Sept. 17, 1975).[9] An accrued benefit, then, represents the interest in a retirement benefit that a participant earns each year, and a plan must state a method or formula for determining a participant's annual accrual rate.[10] This requirement enables a worker to mark his or her progress toward the full pension benefit due at retirement.

A reading of both the Cumberland Fund Plan and the legislative history of ERISA leads us to conclude that plaintiffs' partial pension benefits satisfy ERISA's definition of accrued benefit. Plaintiffs' benefits are annual benefits that are payable at normal retirement age. The Cumberland Fund Plan describes plaintiffs' benefits in terms of a formula, comprising the unit

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9. The Cumberland Fund Plan is a defined benefit plan under 29 U.S.C. § 1002(35), which provides in part that the "term 'defined benefit plan' means a pension plan other than an individual account plan."

10. As a defined benefit plan, the Cumberland Fund Plan must accrue benefits for each active employee at a minimal accrual rate specified by statute. 29 U.S.C. § 1054. ERISA contains three accrued benefits tests, each of which specifies how much of the benefit payable at normal retirement age must accrue each year. 29 U.S.C. § 1054(b)(1)(A), (B), and (C). A defined benefit plan must satisfy one of these three tests. These tests prevent an employer from avoiding the vesting requirements through minimal accrual of benefits in early years of employment, followed by larger benefit accruals as an employee nears retirement. Congress designed ERISA to prevent this practice, known as "backloading of benefits", whereby an employee who for some reason does not continue employment until normal retirement age becomes vested only as to a minimal amount of accrued benefits.

multiplier and the accumulated years of service credit, under which each employee can determine how much benefit has accrued at any given time. In Amendment No. 5, the Cumberland Fund Plan itself labels a benefit earned under the reciprocal agreement an "accrued benefit." Indeed, both full pension benefits and the partial pension benefits, required by the reciprocal agreement, are calculated in accordance with Amendment No. 5 under the heading "accrued benefits."

The legislative history of ERISA's benefit accrual provisions reveals that Congress similarly intended the statute's accrual requirements to govern all *retirement* benefits provided by a pension plan which commence at normal retirement age. The House Conference Report states flatly: "Under the conference substitute, the term 'accrued benefit' refers to pension or retirement benefits." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5054. This category of benefits, the Report notes, contains benefits that are generally not transferable when an employee changes jobs and pension plans.[11].

The House Conference Report then contrasts accrued benefits with certain "ancillary" benefits sometimes available to employees.

> The term [accrued benefit] does not apply to ancillary benefits, such as payment of medical expenses (or insurance premiums for such expenses), or disability benefits which do not

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11. "[W]here the employee moves from one employer to another, the ancillary benefits (which are usually on a contingent basis) would often be provided by the new employer, whereas the new employer normally would not provide pension benefits based on service with the old employer." S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4935.

> exceed the normal retirement benefit payable at age 65 to an employee with comparable service under the plan, or to life insurance benefits payable as a lump sum.
>
> Also, the accrued benefit does not include the value of the right to receive early retirement benefits, or the value of social security supplements or other benefits under the plan which are not continued for any employee after he has attained normal retirement age.

Id. Plaintiffs' benefits, which serve the primary function of providing retirement income, are not comparable to these types of specialized payments.[12] Plaintiffs' benefits cannot be characterized as "ancillary" simply because they provide partial rather than full benefits.[13]

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12. We note that in Shaw v. International Association of Machinists & Aerospace Workers Pension Plan, 750 F.2d 1458 (9th Cir. 1985), the United States Court of Appeals for the Ninth Circuit similarly held that a "living pension feature" of a pension plan was an accrued benefit under ERISA because it was a retirement benefit, it was expressed in terms of a formula set out in the plan, and it was not transferable from one employer to another. For these reasons, the court found that the feature "fits more easily within the enumeration of accrued" rather than ancillary benefits. *Id.* at 1463-64.

13. Defendants support their argument that the benefits in question here are ancillary benefits by citing the following language from the House Report:

> [The] accrued benefit to which vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age.

H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4726. Plaintiffs' partial pension benefits commence *at*, not before, normal retirement age. The fact that plaintiffs ended their participation in the Cumberland Fund prior to reaching normal retirement age did not alter the date on

The Cumberland Fund mistakenly relies on *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357 (D.N.J. 1982), which involved ancillary benefits. At issue in *Petrella* were early retirement benefits originally available to employees "at the convenience of the company." *Id.* at 1360. The court in *Petrella* held that the subsequent elimination of the early retirement option did not violate ERISA because the benefits were not accrued benefits subject to the prohibition against reduction, nor were they vested benefits protected against forfeiture. *Id.* at 1366. The court specifically noted, however, that the employer acted to insure receipt of all accrued pension benefits as defined in section 1002(23)(A) of ERISA. *Id.* at 1360-61, distinguishing benefits payable before normal retirement age, which were provided at the option of the employer and could be changed without violating ERISA. *See also Sutton v. Weirton Steel Division of National Steel Corporation*, 724 F.2d 406, 410 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 2387 (1984) (distinguishing accrued benefits from early retirement benefits); *see also* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 273, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5054 ("the accrued benefit does not include the value of the right to receive early retirement benefits"). Plaintiffs' benefits here are not analogous to contingent benefits available at the employer's option, such as the receipt of a reduced pension at an early age, and certain health or life insurance benefits.

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which they became eligible to receive their pension benefits. The language quoted above refers to early retirement benefits provided by some plans, under which an employee who opts for early retirement receives benefits before reaching normal retirement age. It should be noted that § 1054(g), as amended by Congress in August 1984, now includes early retirement benefits within the group of accrued benefits protected from unauthorized reductions. 29 U.S.C. § 1204(g) (1982), *as amended by* Retirement Equity Act of 1984, Pub. L. No. 98-397, § 301, 98 Stat. 1426, 1451 (1984).

The Cumberland Fund, in urging that plaintiffs' benefits are ancillary benefits, confuses the concept of "accrued" with that of "vested." Correctly noting that some plaintiffs had no *vested* right to pension benefits at the time of their transfer, defendants mistakenly equate vested with accrued, and contend that no reduction of "vested-accrued" benefits occurred. Congress, however, distinguished the two terms in drafting ERISA. The concepts of accrued on the one hand, and vested or "nonforfeitable"[14] on the other, are related, but not the same. A participant becomes fully vested when he gains a nonforfeitable right to receive his entire accrued benefit.[15] Vesting provisions do not affect the amount of the accrued benefit, but rather govern whether all or a portion of the accrued benefit is nonforfeitable. Accrual provisions provide a formula for calculating the amount of the normal retirement benefit which an employee has earned at any given time. *See Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1561-62 (D.C. Cir.).

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14. Congressional reports and debates use "vested" interchangeably with the term "nonforfeitable." *See* Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 367 (1980). The statutory definition of "nonforfeitable" is as follows:

> The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan.

29 U.S.C. § 1002(19)(1982).

15. ERISA provides that a pension plan must specify a vesting schedule, subject to the minimum vesting requirements of § 203(a), 29 U.S.C. § 1053(a), which determines when an employee's right to receive his accrued benefit becomes nonforfeitable. A participant may be only partially vested depending upon percentages expressed in a plan's vesting schedule.

cert. denied, 105 S.Ct. 127 (1984). The United States Supreme Court has recognized the statutory distinction between the two concepts, noting that the term nonforfeitable described "the quality of the participant's right to a pension rather than a limit on the amount he may collect." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 373 (1980).

Section 204(g) of ERISA protects all accrued benefits from reduction by plan amendment, vested or not, and without regard to whether benefits are currently being paid to a participant who has already retired. The House Conference Report states specifically that "no plan amendment may retroactively reduce the accrued benefit of any participant *(whether or not vested)*." H.R. Conf. Rep. No. 1280, Joint Explanatory Statement of the Committee of Conference, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5053 (emphasis added). In adopting Amendment No. 5 in 1979, the Cumberland Fund trustees reduced the pension benefits of the plaintiffs, which were accrued, although in some cases not fully vested, and in so doing violated section 204(g) of ERISA.

III.

Defendants complain that application of section 204(g) to the benefit reduction in this case would have an unreasonable and harsh result. The Cumberland Fund argues that the trustees' action was justified because under the 1979 amendment plaintiffs would receive pension benefits based on levels of employer contributions several times higher than the rate of contributions actually received by the Cumberland Fund while plaintiffs were active participants. This situation, defendants suggest, threatened to bankrupt the Fund. Plaintiffs respond that this argument

ignores the fact that, between 1967 and 1979, the employee contributions were presumably reinvested and had increased in value. Plaintiffs further contend that the Cumberland Fund had available at least four alternative methods for solving its financial problems.

We need not resolve the questions of the seriousness of the Fund's financial condition or the appropriateness of the trustees' action *vis-a-vis* other possible options. Section 204(g) flatly prohibits reductions of accrued benefits. The single exception is provided by section 302(c)(8), under which the Secretary of the Treasury may grant a request to amend benefit amounts within specified limits on a finding that the amendment is necessary to preserve the fund and a simple waiver of ERISA's minimum funding standards would not solve the problem.[16] Rather than comply with this procedure, the trustees unilaterally effected a retroactive elimination of a benefit increase adopted six years earlier. In neglecting to avail themselves of section 302(c)(8), defendants cannot now complain of their financial straits. ERISA does not authorize this court's exercise of discretion in the matter.

IV.

Defendants further dispute the applicability of section 204(g) here by asserting that ERISA permits the parties to a pension plan to control the level of benefits payable under the plan. To support this assertion, defendants rely on *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), in which the United States Supreme Court considered vested (or nonforfeitable) benefits, and noted that the "statutory definition of 'nonforfeitable' assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular

16. *See supra* note 8.

method for calculating the benefit." *Id.* at 512. The *Alessi* Court's discussion of nonforfeitable benefits does not, however, support defendants' assertion. The fact that parties to a pension plan are required to utilize a vesting formula to determine to what extent accrued benefits are nonforfeitable does not undercut either ERISA's proscription of accrued benefit reductions or section 204(g)'s applicability. While parties to a pension plan may freely set the amount of benefits due employees at normal retirement, once set, a plan amendment reducing any accrued benefits would contravene section 204(g). In other words, "the accrued benefit is to be determined under the plan, *subject to certain requirements*," H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5054 (emphasis added), one of which is that accrued benefits not be reduced by a subsequent plan amendment.

Moreover, the Supreme Court's holding in *Alessi* and its reasoning in support thereof buttress our conclusion that the plaintiffs' benefits under the Cumberland Fund Plan are accrued benefits protected under ERISA. In *Alessi*, the Court permitted the offset of workers' compensation payments against benefits otherwise payable under the plan. The Court specifically noted, however, that offsets for benefits payable under other state or federal laws had been authorized by pre-ERISA Treasury Regulations and that, in two published Revenue Rulings issued prior to ERISA's enactment, the Internal Revenue Service had expressly approved the reduction of pension payments by the amount of workers' compensation awards. Because of the prior administrative practice of allowing offsets for workers' compensation awards, the Court found that Congress would have expressly prohibited such offsets in ERISA if it had wanted to eliminate them.

Congress did, of course, expressly prohibit the retroactive reduction of accrued benefits in enacting section 204(g) of ERISA. Moreover, the Department of Treasury had never authorized retroactive reductions in accrued benefits, as it had the compensation offset in *Alessi*. The absence of legislative or administrative approval of such reductions reflects the dissimilarity between retroactive reductions of pension benefits by plan amendment and the offset of workers' compensation payments. The *Alessi* Court compared the offset of workers' compensation payments to the integration of Supplemental Social Security or Railroad Retirement payments with pension benefits. In such cases, the "individual employee remains entitled to the established pension level, but the payments received from the pension funds are reduced by the amount received [from the other source]." 451 U.S. at 516. Plaintiffs' accrued benefits are unlike social security supplements or other ancillary benefits incidental to a full pension benefit. Plaintiffs draw their pensions proportionally from each pension fund in which they participated. In reducing its percentage share, the Cumberland Fund Plan amendment denies plaintiffs a full pension, not an extra supplement.

V.

The protection of retirement benefits reflects the underlying policy goals of ERISA. Congress's chief purpose in enacting the statute was to ensure that workers receive promised pension benefits upon retirement. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). In constructing ERISA, Congress perceived the statute's accrual and vesting provisions as the heart of the protection.

> Unless an employee's rights to his accrued pension benefits are nonforfeitable, he has no

> assurance that he will ultimately receive a pension. Thus, pension rights which have slowly been stockpiled over many years may suddenly be lost if the employee leaves or loses his job prior to retirement. Quite apart from the resulting hardships. . . . such losses of pension rights are inequitable, since the pension contributions previously made on behalf of the employee may have been made in lieu of additional compensation or some other benefit which he would have received.

S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4930. The result reached here serves the statutory purpose as envisioned by Congress. A plan amendment that retroactively reduces benefits promised to plaintiffs for almost seven years is precisely the sort of inequity Congress designed ERISA to prevent. The Cumberland Fund Plan amendment reduced by seventy-five percent the partial pension benefits earmarked for plaintiffs under the Plan's accrual formula. At the same time, plaintiffs' co-workers who remained with the Cumberland Fund still receive pensions based on the $25.00 unit multiplier. The 1979 amendment deprived plaintiffs of the secure retirement income earned during their working prime. In enacting ERISA, Congress proscribed pension fund amendments which cause this type of loss by reducing accrued benefits absent extreme circumstances and governmental approval.

VI.

The judgment of the court below will be reversed as to defendants Cumberland, Maryland Area Teamsters Pension Fund and the individually named trustees thereof, and the within case will be remanded for proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts, C.M.C. Printing, Phila., Pa. 215-568-4264)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3116

KENNETH HOOVER, ALBERT GUYTON
AND ALEX GUYER

vs.

CUMBERLAND, MARYLAND AREA TEAMSTERS
PENSION FUND

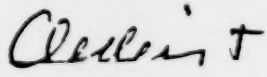
(W.D.PA. Civ. No. 81-1725)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER GARTH, HIGGINBOTHAM, SLOVITER, and BECKER, *Circuit Judges*,* and CAHN, *District Judge*.**

The petition for rehearing filed by Cumberland-Maryland Area Teamsters Pension Fund in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,



DATED: May 6, 1985 *Chief Judge*

*Judge Weiss did not participate in the decision of this matter.

**Honorable Edward N. Cahn, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Kenneth Hoover, et al.,
Plaintiffs,

vs.

Cumberland Maryland Area
Teamsters Pension Fund, et al.,
Defendants.

Civil Action
No. 81-1725

PROCEEDINGS

Hearing held on January 27, 1984, United States District Court, Pittsburgh, Pennsylvania, before the Honorable Donald Ziegler.

APPEARANCES:

On behalf of the Plaintiffs:
Thomas H. Geoghegan, Esq.

On behalf of the Defendant Cumberland:
David Beck, Esq.

On behalf of Western Penna. Teamsters:
Claire Kimmel, Esq.

Court Reporter:
Jordan Lilienthal
1029 United States Courthouse
Pittsburgh, PA 15219

(The following proceedings were held on January 27, 1984, United States District Court, Pittsburgh, Pennsylvania, before the Honorable Donald Ziegler.)

THE COURT: Good morning, ladies and gentlemen. This is the case of Kenneth Hoover and others, plaintiffs, versus Cumberland Maryland Area Teamsters Pension Fund and others as defendants, at Civil Action No. 81-1725.

Before reciting these findings, I would like to compliment the lawyers for their able and thorough presentations in this case. It is a pleasure to preside over a case which is presented by professionals.

No. 1, plaintiffs, Kenneth Hoover, Albert Guyton and Axle Guyer, filed a pro se complaint against Cumberland, Maryland Area Teamsters Fund, and Western Pennsylvania Teamsters Pension Fund, and the trustees of each Fund, on October 2, 1981. Plaintiffs sought to represent a class of former participants of the Cumberland Fund who are, according to paragraph 6 of the Complaint, participants of the Western Pennsylvania Fund. In brief, the complaint alleges that the trustees of the Cumberland Fund breached their fiduciary duties, and further that both Funds are estopped from denying to plaintiffs certain additional pension benefits. Plaintiffs allege a violation of the Employee Retirement Income Security Act, and seek equitable relief and counsel fees.

No. 2, defendants filed answers denying the allegations and set forth the affirmative defenses of res judicata and collateral estoppel based on the judgment entered by this court in the case of Robert Kagarise, Albert Mountain, and

Pauline May versus Cumberland, Maryland Area Teamsters Pension Fund. The judgment in that case was affirmed by the Court of Appeals in a written opinion dated October 2, 1981, and reported at 661 F.2d 19 (3d Cir. 1981).

The pro se complainants in this case, namely, Hoover, Guyton and Guyer, had sought to intervene in the Kagarise case while the appeal was pending before the Court of Appeals. See Exhibit 18 of plaintiffs. However, the Court of Appeals denied the motion apparently because the plaintiffs had never moved for class certification in the District Court, and because the judgment was limited to the claims and contentions of Kagarise, Mountain and May.

No. 3, on February 4, 1982, in this case, plaintiffs moved to amend their pro se complaint in order to seek representation of a class pursuant to Federal Rule 23(b)(3). On March 1, 1982, Thomas Geoghegan and Ronald Berlin entered their appearances and the parties proceeded with discovery. On June 22, 1982, plaintiffs amended their complaint by adding count 3 to plead a collateral agreement between the Funds to pay reciprocal pension benefits to former participants of the Cumberland Fund at a particular unit multiplier. Defendants filed appropriate answers, and further discovery ensued.

No. 4, on March 15, 1983, this court certified a class, pursuant to Federal Rule 23(b)(2), consisting of "all drivers of either the Cooper-Jarett Co. or the Interstate Motor Freight Co. who changed participation in the employee benefit plans, as a result of a transfer from the Bedford facility to the Pittsburgh facility during the period 1967 through 1972."

No. 5, during this bench trial for injunctive relief, plaintiffs have advanced four theories in support of their claims against the Cumberland Fund. First, the Cumberland Fund is estopped from paying reciprocal pension benefits at a unit multiplier which is less than the unit multiplier used by the Western Pennsylvania Fund due to the oral representations allegedly made by Charles Stutzman at a meeting at the Penn-Bedford Hotel in Bedford, Pennsylvania in 1967.

Second, the Cumberland Fund agreed on June 13, 1972, to pay pension benefits to plaintiffs, and the class, due to additional oral statements made by Stutzman, which were acted upon by the Cumberland Fund that same year.

Third, the adoption of the unit multiplier in effect on the date of final participation in the Cumberland Fund is violative of Section 204(g) of ERISA.

And, fourth, the change in 1978 of the unit multiplier for computation of pension benefits is arbitrary, capricious and contrary to rule of uniformity. In addition, plaintiffs seek relief against the Western Pennsylvania Fund based on statements attributed to Thomas Fagan, which, according to plaintiffs, establish promissory estoppel.

No. 6, jurisdiction is based on 29 U.S.C. Section 1132 and 28 U.S.C. Section 1331.

No. 7, defendants have advanced theories in defense of the claims of plaintiffs. First, that neither Charles Stutzman nor Thomas Fagan made oral promises that plaintiffs would receive a particular amount of reciprocal pension benefits from either the Cumberland or Western Pennsylvania Fund.

Second, the Cumberland Fund increased the unit multiplier on June 13, 1972, from $6 to $25/month due to the written recommendation of the Central States Pension Fund.

Third, the reduction of the unit multiplier by Cumberland Fund in 1978 was not proscribed by the Reciprocal Argument, or the pension plan, and was based on a recommendation of an actuary in order to preserve the financial soundness of the Fund.

Fourth, reciprocal partial pension payments are not accrued benefits under ERISA and, even if the court so finds, the decision to utilize the unit multiplier in effect on the date that plaintiffs terminated their participation in the Cumberland Fund was not contrary to federal law.

Fifth, the decision of the trustees of Cumberland Fund in 1978 to employ the unit multiplier in effect when a participant left the Fund was required to ensure the actuarial soundness of the Fund.

Sixth, plaintiffs have failed to establish detrimental reliance, by a preponderance of the evidence, and seventh, plaintiffs are barred by the judgment in the Kagarise case from pursuing the instant case on any theory against any of the defendants because plaintiffs are in privity with the plaintiffs in Kagarise and the doctrines of claim and issue preclusion stand as a bar.

No. 8, we will address the contention of defendants that the defensive use of collateral estoppel precludes consideration of any of the issues in this case because, according to defendants, plaintiffs were parties, or in privity with the plaintiffs in the case of Kagarise, et al, versus Cumberland Fund, et al, 661 F.2d 19 (3d Cir. 1981). Defendants rely upon Davis versus United States Steel Supply, 688

F.2d 166 (3d Cir. 1982) and Sections 27, 29 and 41 of the Restatement of Judgments (Second). We find that defendants have failed to establish their affirmative defense by a preponderance of the evidence.

No. 9, our finding that plaintiffs are not barred from pursuing the instant case by either claim or issue preclusion is based on the following facts, which we find to have been established by a preponderance of the evidence:

(a) Kenneth Hoover, Albert Guyton and Axle Guyer were not parties in the Kagarise case;

(b) Western Pennsylvania Teamsters and Employees Pension Fund, or its trustees, were not parties to that case;

(c) The Kagarise case was not certified as a class action pursuant to Federal Rule 23, and neither party moved for certification;

(d) The offer by Cumberland Fund at the outset of the Kagarise case that it would recalculate benefits for all participants, if the court found against it, does not establish defensive collateral estoppel against the plaintiffs here because, as we have found, they were not parties or privies to that action;

(e) Plaintiffs here, and the class, are not in privity with the three plaintiffs in the Kagarise case because the parties differ; the issues presented here were not litigated in the former case; plaintiffs lacked a full and fair opportunity to participate in the first case; plaintiffs, including the class members, neither controlled nor participated in the Kagarise case; there is insufficient evidence that the class received the notices that were mailed by the local union; also plaintiffs had no

notice prior to trial, although some members attempted to exercise due diligence in discovering the facts concerning the defendants and the theories of liability being advanced by Kagarise, Mountain and May; and, finally, the Kagarise case did not afford plaintiffs an adequate opportunity to present their claims on the merits and the interests of justice require that we proceed to the merits of this case.

No. 10, although we have found for plaintiffs on the defense of res judicata and collateral estoppel, we reject plaintiffs' argument that Attorney Samuel Pasquarelli did not vigorously pursue the claims of Kagarise, Mountain or May, and we further reject plaintiffs' argument that collision somehow existed in the first case among anyone. We find that Samuel Pasquarelli pursued the Kagarise case with due diligence and reasonable prudence. We will now address the merits of this dispute.

No. 11, plaintiffs contend that at a meeting of the members of Local 453, at the Penn-Bradford Hotel in December 1967, Charles Stutzman and Thomas Fagan assured the membership that the Cumberland Fund was solvent. Further Fagan orally stated that if Cumberland Fund failed to pay reciprocal pensions at the same rate as the Western Pennsylvania Fund, the latter would make up the difference.

Thus, according to plaintiffs, they relied on those statements and moved from Bedford to Western Pennsylvania, where they became members of Locals 249 or 261. Stutzman was president of Local 453 and a trustee of the Cumberland Fund at the time. Fagan was president of Local 249 and a trustee of the Western Pennsylvania Fund at the time. Stutzman is now deceased, and Fagan denied during trial that he ever made such a statement. Plaintiffs

rely on the teachings of Rosen versus Hotel and Rest. Employees, 637 F.2d 592 (3d Cir. 1981), and the decision of Judge Sarokin in November versus Pension Trust Fund, 112 L.R.R.M. 2590 (1981).

No. 12, we find that plaintiffs have failed to establish, by a preponderance of the evidence, that either Stutzman or Fagan made misrepresentations to plaintiffs, or the membership, at the meeting at the Penn-Bradford. We find the evidence preponderates that Fagan stated, at the meeting, that the Western Pennsylvania Fund is solvent and the men would receive the benefits to which they were entitled, if they transferred from Local 453. We find the credible evidence establishes that Fagan never stated that the Western Pennsylvania Fund would make up any difference in reciprocal pension benefits, if the Cumberland Fund failed to pay a particular level of benefits in the future.

We also find that the credible evidence establishes that Mr. Stutzman never guaranteed that the Cumberland Fund would pay a particular amount or level of reciprocal benefits, or the same benefits as any other fund, if any member transferred from the local. We find the credible evidence establishes that plaintiffs were advised that their seniority would be protected upon transfer, and further, that they would receive the benefits to which they were entitled under the Reciprocal Agreement.

The minutes of the Cumberland Fund dated June 16, 1969, are instructive in this regard. The minutes are marked as Cumberland Exhibit E, and at page 2 the following entry appears: "Mr. Stutzman raised for discussion the need for an amendment that will provide a partial pension for members (under a Reciprocal Agreement) who transfer out of the Cumberland Plan in such amount as was provided by the Cumberland Plan at the time the members

transferred to another Plan." It bears emphasizing that Cumberland Fund is paying benefits to plaintiffs in such amount as was provided by the Fund when plaintiffs transferred to another plan.

No. 13, we next find that the Cumberland Fund increased the unit multiplier from $6 to $25/month for each year of service in 1972 due to the bulletin from the Central States Pension Fund dated February 8, 1972. Cumberland Exhibit P. We find not credible the evidence that Stutzman allegedly made statements to certain persons concerning the reasons for the increase in the unit multiplier for plaintiffs. In this regard, we have carefully reviewed Plaintiffs' Exhibit 16, and we find no evidence that Mr. Stutzman made any promises to the membership which could serve as a basis for estoppel against the Cumberland Fund at the meeting of August 18, 1972.

In short, we find that the Cumberland Fund increased the reciprocal benefits on June 13, 1972, in order to attempt to pay a benefit which was consistent with the benefits then being paid by Central States Fund, and for no other reason. See Cumberland Exhibit G, page 1 at paragraph 4.

No. 14, in sum, we find that plaintiffs were advised concerning their seniority rights, if they transferred from Local 453, at the meeting at the Penn-Bradford, and they were further advised that pension benefits would be paid in accordance with the Reciprocal Agreement. We reject, as not persuasive, the testimony that plaintiffs were told that, if the Cumberland Fund did not pay a reciprocal pension, or did not pay benefits at a particular rate, Western Pennsylvania Fund would make up the difference. As a result, we find that the trustees of Cumberland Fund did not delimit their authority or discretion under the Reciprocal

Agreement or Plan to make lawful decisions to ensure the financial stability of the Fund. We also reject, as unpersuasive and not credible, that any separate collateral agreement was made or existed in 1967 or 1972, between Cumberland Fund and Western Pennsylvania Fund based on alleged statements of Fagan or Stutzman. In light of our finding that Messrs. Stutzman or Fagan did not make the promises alleged by plaintiffs, we need not address the question of detrimental reliance.

No. 15, we turn now to the question of whether the decisions of the trustees of Cumberland Fund were lawful. Plaintiffs contend that decision of the trustees on July 1, 1978, to employ the unit multiplier in effect on the date of termination of participation in the plan, rather than the multiplier in effect on the date of retirement, is violative of Section 204(g) and Section 411(d)(6) of the Internal Revenue Code. Plaintiffs contend that the Cumberland Fund breached its fiduciary duty by reducing an accrued benefit, as that term is defined in Section 3(23) of ERISA, 29 U.S.C. Section 1002(23); thus, according to plaintiffs, the 1978 decision, which predated the formal amendment of the plan adopted on January 18, 1979, was an illegal reduction of accrued benefits for service accumulated before 1978.

No. 16, defendants rejoin that the legislative history of ERISA established that an accrued benefit is a benefit expressed in the form of an annual benefit commencing at normal retirement age. H.R. Report No. 93-807, 93 Cong., 2d Sess., U.S. Code Cong. & News 4670, 4726 (1974). Defendants point out that plaintiffs, and the class, did not have a combination of sufficient years of credited service with the Cumberland Fund and normal retirement age to receive any pension benefit under the plan, trust agreement

or reciprocal agreement, when they transferred from the fund, and, therefore, the utilization of a different unit multiplier did not reduce an annual benefit commencing at normal retirement age.

Further, according to defendants, accrued benefits were not eliminated or reduced because plaintiffs are receiving reciprocal partial pensions from the Cumberland Fund based on their years of credited service; hence, because the change merely altered the method of calculating the amount to be paid for the credited years of service, and because the change occurred prior to the normal retirement age of plaintiffs, there is no violation of federal law. In short, no vested benefit right was affected in this case because the reciprocal partial pensions are ancillary benefits under the circumstances. Petrella versus NL Industries, Inc., 529 F.Supp 1357, 1366 (D.N.J. 1982).

No. 17, Congress has provided that an accrued benefit of a participant under a plan may not be decreased by an amendment to a plan, 29 U.S.C. Section 1054(g), and further that an accrued benefit is an annual benefit commencing at normal retirement age, 29 U.S.C. Section 1002(23). A benefit is non-forfeitable or vested if it is part of an immediate or deferred benefit, which arises from a participant's service, which is unconditional and which is legally enforceable against the plan, 29 U.S.C. Section 1002(19). However, as the Supreme Court noted in Alessi versus Raybestos Manhattan, 451 U.S. 504, 511, what constitutes a vested benefit, as well as the level of benefits, is left largely to the private parties.

Justice Marshall, speaking for a unanimous Court, observed that "the statutory definition of 'non-forfeitable' assures that an employer's claim to the protected benefit is legally enforceable, but it does not guarantee a particular

amount or method for calculating the benefit." The court continued that ERISA protects "the claim to the benefit rather than the benefit itself, that must be 'unconditional' and legally enforceable against the plan." 451 U.S. at 512.

No. 18, Congress has provided some guidance. The House report states that an "accrued benefit to which vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age." H.R. Report No. 93-807, 93d Cong., 2d Session, U.S. Code Cong. & Ad. News at 4726. In this case, plaintiffs had no right to receive any benefits from Cumberland Fund when they transferred in 1968 because benefits were not payable prior to normal retirement age.

As plaintiffs' Exhibit No. 8 demonstrates, 34 of the transferring members had 10 years or more of credited service, but no one satisfied the age requirement set forth in Section 12.19 of the Cumberland Fund Pension Plan. See Plaintiffs' Exhibit 1. Thus we find that plaintiffs did not possess an accrued benefit when they transferred from the Cumberland Fund and the vesting provisions of 29 U.S.C. Section 1002(19) are inapplicable. We agree with Judge Sarokin's able analysis in Petrella versus NL Industries, Inc., 529 F.Supp. at 1366, and hold that plaintiffs' benefits were ancillary benefits which could be modified providing the decision was rational and not discriminatory, or violative of some specific provision of ERISA.

No. 19, as the Supreme Court has noted, the definition of a vested benefit, as well as the level of benefits, is primarily a matter of contract. Article II, Section 2.01 of the Cumberland Fund Pension Plan requires that a participant

complete 10 years of covered employment in order to qualify for a vested deferred benefit payable at normal retirement age. Normal retirement age is set forth in Section 12.19, but the earliest date is age 60. An early retirement benefit can be paid with 15 years of credited service.

However, when a normal or early retirement benefit is grounded on vested deferred benefits, the monthly amount is calculated on the unit multiplier and credited service "determined as of the participant's termination date." Exhibit 1 at page 4. Amendment 4, adopted on January 18, 1979, granted the trustees authority to establish a unit multiplier consistent with Section 3.02 for any participant who is eligible under any reciprocity agreement. Most importantly, however, there is no limitation on the discretion of the trustees to adjust the unit multiplier for any class of participants in the reciprocal agreement, pension trust agreement or pension plan.

No. 20, we must decide therefore whether the trustees of Cumberland Fund breached their fiduciary duties when they determined on July 1, 1978, to revert to the unit multiplier for vested partial benefits payable under a reciprocal agreement, which was in effect when plaintiffs transferred from the Cumberland Fund in 1969. As rehearsed, the Fund employed the unit multiplier in effect when a member ceased participation in the Fund until June 13, 1972, when the Fund adopted the unit multiplier in effect on the date of retirement for payment of partial reciprocal pension benefits. See Cumberland Exhibit G. The Court of Appeals held in Rosen versus Hotel & Rest. Employees of Philadelphia, 637 F.2d 592 (3d Cir. 1981) that our standard of review is whether the decision was arbitrary or capricious. The test was further explained in Adams versus

Trustees of N.J. Brewery Employees, 670 F.2d 387 (3d Cir. 1982).

No. 21, the overwhelming credible evidence in this case establishes that the decision of the trustees was required to preserve the actuarial soundness of the Cumberland Fund. Frank Stokes advised the trustees in a written report that, from February 1, 1976, to June 1, 1977, the Fund incurred a net experienced loss of $800,000. The Fund also experienced a contributory deficiency of $179,000 due to the large number of partial pensions, the number of pensioners and the decrease in employer contributions.

As a result, the trustees determined to adopt the unit multiplier in effect on the date of termination for those participants who had withdrawn from the Cumberland Fund. The trustees reasoned that, since contributions were no longer being made on behalf of the members who had left the Fund, it was imprudent to continue paying benefits at the rate being paid to members for whom recent or current contributions were being made. Such contributions which were, of course, at a much higher rate than the employer contributions made on plaintiffs' behalf. We find no violation of Section 404(a) of ERISA, 29 U.S.C. Section 1104(a) even if the result has some preferential effect for current members.

No. 22, plaintiffs, through their able lawyer, have argued vigorously that the actuarial assumptions used by Frank Stokes and the Fund are too conservative. Plaintiffs also presented evidence from an expert that the Fund could employ four reasonable options rather than reducing the unit multiplier. However, we find the evidence preponderates that the actuarial assumptions used by the Fund are reasonable, and further that the proposals suggested by

Richard Daskins were not required under the circumstances. Stated another way, the reduction of the multiplier was within the discretion of the trustees, and it was not arbitrary to select their solution rather than those advocated by Mr. Daskins.

No. 23, the decision of the trustees did not constitute a retroactive cancellation of past service credits. Plaintiffs are receiving, or will receive, partial reciprocal pensions based upon their years of credited service, contrary to Winpinsinger versus Aurora Corp., 456 F.Supp. 559 (N.D.Ohio 1978). Here all current and former participants of the Cumberland Fund will receive pensions based on their credited years of service. Since the level of benefits is based on actuarial considerations, which are sound, we find that the decision of the trustees was not arbitrary and capricious.

No. 24, in Adams versus New Jersey Brewery Employees, 670 F.2d 387, 297-398 (3d Cir. 1982), the Court of Appeals stated as follows: "The trustees of a pension plan have a fiduciary duty to preserve the financial security of a pension fund and to apply the assets of the fund for the benefit of the employees to the greatest extent possible. We recognize that these respective obligations are often conflicting. Any action taken by the trustees is bound to be categorized as arbitrary by those adversely affected by it. Partly because of these conflicting obligations, trustees are given broad discretion to act.

"Our role in reviewing the actions of trustees of pension funds is limited. As we noted in Knauss, a finding of arbitrary and capricious action must be made before we will excise a clause such as the one before us. Various factors facilitate this determination: 1) Did the partial termination clause divest the employee of otherwise sufficient

service credits? 2) Was the break in service involuntary? 3) Were the exceptions provided in the clause irrational? 4) Most importantly, did the trustees' action in adopting the clause lack substantial justification?"

Applying the foregoing factors it is clear that the decision of the trustees was not arbitrary or capricious. First, the utilization of a distinct unit multiplier in 1978 to non-participants did not deprive plaintiffs of otherwise sufficient service credits. Second, plaintiffs' termination in service was voluntary, because they could remain with the Fund by obtaining employment in Bedford with a contributing employer. Third, the preference of the trustees for current contributory participants, as opposed to former and noncontributing members, was not irrational. And, finally, as we have noted, the adoption of the unit multiplier in effect when plaintiffs transferred from the Fund was substantially justified. In short, we find that the action of the trustees did not violate their fiduciary duties and did not violate Sections 203(a), 204(g), 206, 401(a)(4) and 404(a) of ERISA, or any other provision of federal law or the Internal Revenue Code.

No. 25, we also find that the decision of the trustees to pay partial pension benefits to four or five former participants, who retired prior to 1978 at the unit multiplier in effect on the date of their retirement, did not establish an illegal preference or violate the rule of uniformity. These former participants had retired and were receiving partial reciprocal pensions at the time the trustees took action to reduce the unit multiplier in 1978.

Any reduction in their partial pensions may have implicated 29 U.S.C. Sections 102(23) and 1054(g) because it arguably would have constituted a reduction of an

annual benefit which had commenced at normal retirement age. This does not mean, of course, that the trustees did not retain the power to exercise their fiduciary duties with respect to future claimants when the actuarial soundness of the plan was called to their attention by the actuarial valuation of June 1, 1978.

The pension plan and trust agreement granted such power, and we find no abuse of discretion. Moreover, as we found in Kagarise, and repeat here, the reciprocal agreement did not limit the authority or discretion of the trustees. As a result, judgment will be entered for the defendants, and against the plaintiffs, and a written order will follow.

Thank you very much.

(Whereupon, the proceedings were concluded.)

* * * * *

CERTIFICATE

I, Jordan Lilienthal, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Jordan Lilienthal Date